



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF S-S-T- CORP.

DATE: JULY 22, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of international long-distance telephone services and calling cards, sought to permanently employ the Beneficiary as a controller under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director concluded that the record did not establish the Petitioner's continuing ability to pay the proffered wage or the Beneficiary's qualifying experience for the offered position. The Director also invalidated the accompanying labor certification, finding that the Beneficiary misrepresented his qualifying experience on the labor certification. Accordingly, the Director denied the petition on January 27, 2015.

The appeal is properly filed and alleges specific errors of fact and law. The record documents the case's procedural history, which will be incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record, including new evidence properly submitted on appeal.¹

I. THE MOOTNESS OF THE APPEAL

On appeal, the Petitioner does not challenge the petition's denial on the grounds of ability to pay or the Beneficiary's qualifying experience. Rather, the Petitioner seeks "to clarify the record," arguing that the Director erred in finding the Beneficiary's fraudulent or willful misrepresentation of a material fact on the accompanying labor certification. The Petitioner also states that it no longer intends to employ the Beneficiary. *See* INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F) (allowing a

¹ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow submission of additional evidence on appeal.

petition's filing by an employer "desiring and intending to employ" a foreign national in the United States).

We may dismiss an appeal as moot if it lacks practical significance. *Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753 (BIA 1999) (holding that an administrative tribunal may dismiss an appeal or deny a motion as moot as a matter of prudence). Because the Petitioner does not challenge the petition's denial and no longer intends to employ the Beneficiary, our opinion in this matter appears to lack practical significance.

However, the Director's finding of misrepresentation on the accompanying labor certification may affect the Beneficiary's future admissibility to the United States. See INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i) (rendering inadmissible foreign nationals who have sought to procure a visa or other immigration benefits "by fraud or willfully misrepresenting a material fact"). We therefore decline to dismiss the appeal as moot.

II. INVALIDATION OF THE LABOR CERTIFICATION

U.S. Citizenship and Immigration Services (USCIS) may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

Fraud "consist[s] of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party." *Ortiz-Bouchet v. U.S. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013) (quoting *Matter of G-G-*, 7 I&N Dec. 161, 164 (BIA 1956). "The representation must also be believed and acted upon by the party deceived to his disadvantage." *Id.* A willful misrepresentation of a material fact includes the same elements as fraud, except that a willful misrepresentation does not require an intent to deceive or proof of a successful deception. *Id.* at 1356-57 (citing *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 290 (BIA 1975)).

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); see also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. The

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petition's priority date is May 15, 2009, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The accompanying labor certification states the minimum requirements of the offered position of controller as a U.S. Bachelor's degree or a foreign equivalent degree plus 60 months of experience in the job offered. The labor certification states that experience in an alternate occupation is unacceptable.

The Beneficiary attested on the labor certification to more than 17 years of full-time experience before the application's filing on May 15, 2009. The Beneficiary stated the following experience:

- About 11 years as general manager with [REDACTED] in the United States from May 11, 1998 to the filing of the labor certification application on May 15, 2009;
- About 34 months as a financial manager with [REDACTED] in Argentina from February 28, 1994 to December 27, 1996;
- About 24 months as an accountant with [REDACTED] in Argentina from February 24, 1992 to February 25, 1994; and
- About 22 months as an assistant accounting chief with [REDACTED] in Argentina from April 23, 1990 to February 21, 1992.

A. The Beneficiary's Claimed Experience with [REDACTED]

The Director questioned the veracity of the Beneficiary's claimed experience as a general manager with [REDACTED] from 1998 to 2009. The Director noted that online government records indicate that the Beneficiary incorporated [REDACTED] in 1997 and served as its president from 2000 to 2004. *See* Fla. Dep't of State, Div. of Corps., at [http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=\[REDACTED\]](http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=[REDACTED]) (accessed Feb. 10, 2016). The government records also indicate the Beneficiary's service as a corporate officer with six other companies during his tenure with [REDACTED] *id.* at [http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResults/OfficerRegisteredAgentName\[REDACTED\]](http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResults/OfficerRegisteredAgentName[REDACTED]) (accessed Feb. 10, 2016), casting doubt on his claimed continuous, full-time employment by [REDACTED] during the period.

The record also contains evidence that the Beneficiary was criminally charged with operating a business without a license while working at one of the other companies in 2004. The Director further found that the Beneficiary was not physically present in the United States for extended periods during which he claimed to work for [REDACTED]

However, even if the Beneficiary misrepresented his employment by [REDACTED] on the labor certification, the record does not establish that claimed experience as material. As previously

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indicated, the accompanying labor certification states that the offered position requires 60 months of experience "in the job offered." Experience in an alternate occupation is unacceptable.

The accompanying labor certification states the duties of the offered position of controller as: preparing and filing tax returns and financial statements, reports, forecasts, and budgets; supervising employees who perform financial activities; and conducting or coordinating financial audits. The Beneficiary attested on the labor certification, and a May 25, 2010, letter from [REDACTED] president also indicates, that the Beneficiary's position as a general manager with [REDACTED] involved different duties, including planning and developing organizational policies and goals, and directing and coordinating the promotion of products and services.

The labor certification and the [REDACTED] letter state that the Beneficiary analyzed budget requests and allocated operating budgets as a general manager with [REDACTED]. However, the record does not establish that the Beneficiary performed most of the duties of the offered position of controller when he was employed by [REDACTED]. Thus, the record does not establish that the Beneficiary's experience as a general manager with [REDACTED] constitutes experience in the offered position as specified on the accompanying labor certification. The Beneficiary's claimed experience with [REDACTED] is therefore not a material fact, the misrepresentation of which would justify the invalidation of the accompanying labor certification.

B. The Beneficiary's Claimed Experience in Argentina

The Director also questioned the authenticity of letters submitted in support of the Beneficiary's claimed qualifying experience with [REDACTED] and [REDACTED] in Argentina. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed qualifying experience with letters from employers). Although the three letters are written primarily in English, the Director noted that all of them state their dates and the titles of their signatories in Spanish. He also found that all of the letters appear to have been printed from the same machine and that one letter contained the same font as the employment verification letter from [REDACTED]. *See Matter of Ho*, 19 I&N Dec. 582, 191 (BIA 1988) (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence of record in support of a petition).

The Director also noted inconsistencies between the letters and the Beneficiary's "Curriculum Vitae" (CV), which was submitted with a prior petition on his behalf. The CV states the Beneficiary's employment by [REDACTED] as a "Manager of Human Resources" from 1990 to 1994, not as an accountant from 1992 to 1994. The CV also states the Beneficiary's employment by [REDACTED] from 1967 to 1990, not from 1990 to 1992.

On appeal, the Petitioner concedes that the Beneficiary drafted the experience letters submitted in support of the petition, sent them via e-mail to his former employers for signature, and printed the signed letters from the same printer. Because the Beneficiary drafted the letters on behalf of his former employers, the letters do not constitute independent, objective evidence and do not establish

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the Beneficiary's qualifying experience in accordance with regulations. See 8 C.F.R. § 204.5(g)(1) (requiring the submission of experience letters "from current or former employer(s)"). However, the record indicates that the information in the letters may be true.

A fraud prevention officer at the U.S. Consulate in [REDACTED] reported calling the Beneficiary's three claimed former employers in Argentina in September 2015. Representatives of two of the three employers – [REDACTED] and [REDACTED] – verified the Beneficiary's claimed positions and dates of employment. The officer was unable to contact a representative of [REDACTED] which the officer reported is no longer in business.

The officer reported that the signatory of the [REDACTED] letter did not work for the company at the time he signed the document, that the letter misrepresented his former title with the company, and that the street address of the company on the letter is incorrect. However, the representative of [REDACTED] verified the Beneficiary's claimed positions and dates of employment with the company.

Thus, despite the submission of experience letters drafted by the Beneficiary, including one letter containing misrepresentations regarding the signatory's employment status and title and the company's address, the record indicates that the Beneficiary's claimed qualifying experience on the labor certification may be true. The record therefore lacks substantial evidence of his fraudulent or willful misrepresentation of a material fact on the accompanying labor certification. We will therefore withdraw that portion of the Director's decision and reinstate the validity of the labor certification.

III. CONCLUSION

The record does not support the Director's finding that the Beneficiary fraudulently or willfully misrepresented a material fact on the accompanying labor certification. We will therefore withdraw that portion of the decision and reinstate the labor certification.

However, as the Director found, the record does not establish the Petitioner's continuing ability to pay the proffered wage or the Beneficiary's qualifying experience for the offered position. The Petitioner also states that it no longer intends to employ the Beneficiary. Therefore, the appeal will be dismissed and the petition will remain denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: The ETA Form 9089, case number [REDACTED] is reinstated.

Cite as *Matter of S-S-T- Corp.*, ID# 14022 (AAO July 22, 2016)